IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
September 17, 2009 Session

WENDELL HARRIS and A.C. HOWELL
v.
MAURY COUNTY, TENNESSEE

Appeal from the Circuit Court for Maury County
No. 9505 Jim T. Hamilton, Judge

No. M2008-00859-COA-R3-CV - Filed March 16, 2010

This appeal involves a change in county retirement benefit plans. The county had to adopt a new retirement plan for its employees. The administrator of the new retirement plan conducted an actuarial study to determine the county's cost to join. The cost for the new plan did not credit employees' years of employment as favorably as the old plan, but had more favorable benefits in other respects. By resolution, the county legislative body appropriated the funds to cover the cost for the new plan determined by the actuarial study. Thereafter, county employees sued the county based on the wording of the resolution, alleging that the county had breached an agreement with them. The trial court found that the resolution created an enforceable contract between the county and the class of plaintiff employees and awarded judgment to the employees. The county appeals. We reverse, finding that the class of plaintiff employees did not rebut the presumption that legislation does not create contractual rights.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Reversed

HOLLY M. KIRBY, J, delivered the opinion of the Court, in which ALAN E. HIGHERS, P.J., W.S., and J. STEVEN STAFFORD, J., joined.

Douglas R. Pierce and Drew Farmer, Nashville, Tennessee, for the Defendant/Appellant, Maury County, Tennessee

L. Bruce Peden, Columbia, Tennessee, for the Plaintiff/Appellees, Wendell Harris and A.C. Howell

OPINION

FACTS AND PROCEEDINGS BELOW

The facts in this case are essentially undisputed. In 1974, the County Commission of Defendant/Appellant Maury County, Tennessee ("County") adopted a retirement plan for County employees, which was administered by Life of Georgia Insurance Company ("Life of Georgia"). For over two decades, Life of Georgia administered the County retirement benefit plan.

Under the terms of the Life of Georgia retirement plan, County employees received credit, for the purpose of calculating retirement benefits, for consecutive years of service to the County. The plan referred to this as "credited service."[1] Employees did not begin accruing credited service until they began participating in the retirement plan by making contributions. Employees were eligible to join the plan after three consecutive years of service. The employees were not permitted to make contributions to the plan during the first three years of employment ("noncontributory years").[2]

Under the Life of Georgia plan, employees who joined the plan when first eligible and who met the plan's contribution requirements were retroactively credited with years of service back to the initial hire date. Thus, employees under the Life of Georgia plan eventually received "credited service" under the Life of Georgia plan for the noncontributory

[1]Under the Life of Georgia plan, "credited service" was defined as "continuous service for the Employer." "Continuous service" was defined as "the number of years and complete calendar months during which an employee shall have been continuously and without interruption in the service of the Employer." The plan provided: "If an employee voluntarily terminates his employment, or is discharged, his service shall be deemed to have ceased on the date of his voluntary termination of employment or discharge."

[2]In 1995, the three year noncontributory period was reduced to one year by an amendment to the Life of Georgia plan. As used in this Opinion, the term "noncontributory years" will encompass this period of time as well.

years.[3] During the time the Life of Georgia plan was in effect, Maury County funded all years of credited service, including employees' noncontributory years.[4]

Plaintiff/Appellee Wendell Harris ("Harris") and Plaintiff/Appellee A.C. Howell ("Howell") both began working for the County in 1974.[5] Each enrolled in the Life of

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[3]In this regard, the County deviated from the standard definition of "service" utilized in either a "contributory plan" or a "non-contributory plan." A Life of Georgia representative explained in a letter to the County as follows:

> The benefit accrual service definition is more complex for a contributory plan than for a non-contributory pension plan. For a non-contributory plan the service definition is all service with the employer (unless past service is specifically excluded), where service is defined as each year in which the employee works a minimum number of hours of service.
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> For a contributory plan, the definition generally is "participation service", i.e., the period of time during which the employee makes required contributions to the plan. Under this approach, benefit service begins on the date the employee first joins or enters the plan, as opposed to the original employment date. Here, service prior to the effective date of the plan and service during the waiting period would not be counted.
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> The Maury County Plan rule . . . uses a different approach than either of the above. . . . [T]he benefit calculations have always recognized all continuous service with Maury County, including all past service, provided the participant joined the plan when first eligible and made all required employee contributions up to the retirement date.

(emphasis in original). The County apparently opted for this approach because the Life of Georgia plan generated minimal monthly benefits for County employees.

[4]The 1974 contract between the County and Life of Georgia provided that Life of Georgia would establish an account to hold all contributions to the plan. From this account, Life of Georgia was permitted to withdraw an administration fee; however, the contract provided as follows:

> Notwithstanding anything in this contract to the contrary, no withdrawal shall be made from the deposit administration account for the benefit of any participant which would impair or reduce the amounts then held in the participants' accounts with respect to all other participants in this plan.

The contract also provided that "[u]nder no circumstances" should any funds contributed to the plan "ever revert to the Employer prior to the satisfaction of all liabilities with respect to employees and their beneficiaries." Finally, the terms of the contract permitted modification by agreement of the County and Life of Georgia, but it prohibited any modification that "would result in a forfeiture of any benefit or right of a participant . . . based upon service rendered or contributions made prior to the date of" modification.

[5]Harris was initially hired in 1968. In 1972, he voluntarily resigned his employment with the County and worked elsewhere for approximately two years, returning to the County in 1974. When he joined the Life of Georgia retirement plan, he was not credited with service for this initial term of employment. In (continued...)

Georgia plan when first eligible. Both received credited service under the Life of Georgia plan for their noncontributory years.

In 1997, Life of Georgia notified the County that it intended to terminate its administration of the retirement plan in two years. Thus, the County had two years to identify and implement a new plan administrator.

The County Commission began investigating the feasibility of joining the Tennessee Consolidated Retirement System ("TCRS"). To join TCRS, the County was required to submit to TCRS demographic data concerning its employees in order to conduct an actuarial study. The purpose of the actuarial study was to determine the cost of providing retirement benefits to the employees, and thus, the amount of money the County would have to pay to join TCRS. The demographic data the County was required to submit included a certification of each employee's years of service.

On November 16, 1998, the County Commission adopted Resolution 31 to appropriate funds for the actuarial study. Resolution 31 provided:

> NOW, THEREFORE, BE IT RESOLVED that the Legislative Body of Maury County, Tennessee hereby authorizes and appropriates funds for an actuarial study of the cost(s) of participation for said employees in the Tennessee Consolidated Retirement System; and
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> 1. The actuarial study shall include the following option:
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> The employer will purchase <u>all</u> years of prior service for employees now participating in the existing county pension plan only.

(emphasis in original). On January 19, 1999, Resolution 31 was amended as follows:

> WHEREAS, the Resolution requesting an actuarial study for the County joining the Tennessee Consolidated Retirement system should be clarified regarding the scope of prior services to be included in the study.
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> NOW, THEREFORE, BE IT RESOLVED by the Maury County Legislative Body that Resolution No. 31 of November 1998 is hereby amended to clarify that:

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[5](...continued)
1995, the County Administrative Committee recommended to the County Commission that Harris be given credit for this initial term of employment; however, the full County Commission never acted on the recommendation.

> Maury County intends to buy back now established years of service in the present county retirement plan for county employees.

Thus, with Resolution 31, the County Commission appropriated funds for the completion of the actuarial study, and the amendment clarified that the County intended to fund all years of service credited under the Life of Georgia plan.

In the spring of 1999, the County Human Resources Department compiled and delivered the demographic data on all County employees to TCRS. Only those years in which County employees had made contributions to the retirement plan were included in the demographic data; noncontributory years were not included. TCRS conducted the actuarial study using the credited service data provided by the Human Resources Department.

The results of the actuarial study showed that the County would have to pay $3,098,306 to join TCRS, provided that the $6,027,507 in accumulated employer and employee contributions under the Life of Georgia plan were used to offset the total initial accrued liability. While the actuarial study recited that "[c]osts and benefits were calculated on the assumption that the employer will purchase all prior service for active participants," the $3,098,306 buy-in figure in fact did not take into account the employees' noncontributory years.

After the actuarial study was completed, the County Commission met on October 18, 1999 to consider participation in TCRS. At the meeting, Human Resources Director Shirley Harmon told the County Commissioners that the results of the actuarial study did not include the employees' noncontributory years, in contrast to how it had been done under the Life of Georgia plan. She explained, however, that the new benefit calculation under the TCRS formula resulted in virtually no detriment to participating County employees. There was some discussion of "buying back" the omitted noncontributory years in the future, and TCRS Director Ed Hennessee explained that such a "buy back" was possible, but would require a new actuarial study.[6]

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[6]This exchange took place at the meeting:

> Commissioner Romesburg: So basically if we decide to accept this plan and say six months from now we decide, well lets [sic] go ahead and throw in the year or three years, we can still do that down the road?
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> Mr. Hennessee: Yes sir we'd just need some information on the individuals and send it to our actuary and have a calculation on how it affects the employer rate.
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> . . . .

(continued...)

The County Commissioners were asked to vote on Resolution 17, to fund the County's participation in the new TCRS retirement plan. Before the vote was held, one Commissioner moved to amend the resolution by including all years of prior service, including noncontributory years. It failed for lack of a second. Another Commissioner expressed concern that the proposed resolution did not specify which years were being funded: "But nobody can say what a credited year is at this point. Right?" The Chairman responded, "What they [the employees] paid in." Thereafter, Resolution 17 passed by a vote of 19 to 1.

Resolution 17 provides as follows:

> WHEREAS, the Maury County Government desires to participate in the Tennessee Consolidated Retirement System under the provisions of state law and the following terms and conditions.
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> 1. PRIOR SERVICE: The political subdivision will assume all liability (both employer and employee) for all prior years of credited service for employees who are actively participating in the current retirement plan.
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> 2. COST-OF-LIVING: The political subdivision has the option of providing cost-of-living increases to its retirees and hereby chooses to provide cost-of-living increases for retirees.
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> 3. PART-TIME EMPLOYEES: The political subdivision has the option of providing retirement coverage to part-time employees and hereby chooses to exclude this coverage.
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> . . . .
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> WHEREAS, the effective date of participation shall be on a date as determined by the Board of Trustees of the Tennessee Consolidated Retirement System and the initial employer contribution rate is 8.01% which is based on the estimated lump sum accrued liability of $3,098,306.00.
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> . . . .

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[6](...continued)
Commissioner Romesburg:: I just want to make sure, somewhere down the road if we want to buy those, assist those employees in buying those, so instead of working 33 years, and having 30 years of service they could have 33.

. . . .

Mr. Hennessee: Yes sir, . . ., the way that works is that if there's additional prior service that the county wished to authorize beyond what's covered initially. We would allow the . . .. [sic] if you set it up to where the county was willing to accept its share of the liability and then the employee could make the contributions that would have been paid plus interest. And of course the other option is to for [sic] the county to accept all the liabilities, so you have some flexibility there.

> WHEREAS, participants in the preexisting plan must be given the irrevocable option of transferring membership to the Retirement System or retaining their membership in the preexisting plan; and
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> WHEREAS, Maury County must also transfer directly to the Retirement System all employee assets attributable to those employees transferring membership to the Retirement System; and
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> THEREFORE, BE IT RESOLVED that the Maury County Commission of Maury County, Tennessee, hereby authorizes all its employees in all its departments or instrumentalities to become eligible to participate in the Tennessee Consolidated Retirement System subject to approval by the Board of Trustees pursuant to Tennessee Code Annotated Title 8, Chapter 35, Part 2. It is further understood that pursuant to T.C.A. 8-35-111, no employee of said political subdivision covered by this resolution shall have multiple memberships in any retirement program or programs financed from public funds whereby such employee obtains or accrues pensions or retirement benefits based upon the same compensation and for the same years of service to said political subdivision.

Thus, Resolution 17 authorized the County's participation in the TCRS plan and appropriated $3,098,306 to fund it, in addition to authorizing the transfer of the assets under the old Life of Georgia plan to the new TCRS plan.

Thereafter, pursuant to Resolution 17, the County paid $3,098,306 into TCRS and transferred $6,027,507 in accumulated employee and employer contributions under the Life of Georgia plan into the TCRS plan. Under the TCRS plan, as compared to the Life of Georgia plan, employees were provided a more favorable calculation of benefits as well as annual cost of living adjustments.

The County's participation in the TCRS plan commenced on January 1, 2000. In January 2000, both Harris and Howell joined the TCRS plan. The next month, Harris retired and was credited with 22 years and 7 months of service. In May 2000, Howell retired and was given credit for 21 years and 11 months of service. After retiring, both Harris and Howell began receiving retirement benefits under the TCRS plan.

On May 1, 2001, Harris and Howell filed the instant lawsuit against the County. In the complaint, they alleged that the County had "guaranteed that . . . transfer [to the TCRS plan] would not affect . . . credit for all past service" and that the County had "breached [its] agreement" with them. In the complaint, Harris and Howell sought to represent the class of persons similarly situated ("Plaintiff Class"). The County answered the complaint and denied the allegations. Discovery ensued.

After some discovery, the trial court certified the Plaintiff Class and permitted the case to proceed as a class action.[7] The parties filed cross-motions for summary judgment. After conducting a hearing, the trial court determined that there was a genuine issue of material fact and denied both parties' cross-motions.[8] Thereafter, the case was set for trial and the parties stipulated as to seventy-six facts and twenty-seven exhibits.

On April 18, 2007, a bench trial was held. During the course of the proceedings, the trial court heard testimony from *inter alia* Harris, Howell, and TCRS Director Ed Hennessee. Twelve additional exhibits were entered into evidence.

At the trial, Howell testified that he had been employed by the County since 1974. He had contributed to the Life of Georgia plan since January 1978, but had credited years of service for his entire employment. Howell chose to retire under the TCRS plan, and acknowledged that the TCRS plan was better overall than the Life of Georgia plan. However, he felt that employees who had participated in the Life of Georgia plan should not "be punished or . . . discriminated against and not receive the benefits of the new plan as well as what they were promised under the old plan." He said he was damaged by the change in plans "because I would be drawing more under the new plan if I had got credit for my back years' service."

Harris claimed at trial that employees were misinformed that they could not stay in the Life of Georgia plan, and were in effect told that they had to transfer to the new TCRS plan. However, he acknowledged that his monthly benefit was more under the TCRS plan than it would have been under the Life of Georgia plan, even without credit for his noncontributory

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[7]The motion to certify the class described it as consisting of two distinct groups:

> (a) All former employees of Maury County who were active participants in the county's retirement plan as of December 31, 1999 and who have retired subsequent to that date; and (b) All present and former employees of Maury County who were active participants in the county's retirement plan as of December 31, 1999 and who lost credited years of service established in the former plan upon the County's conversion to the Tennessee Consolidated Retirement System effective January 1, 2000.

The trial court's certification of the class was not raised as an issue on appeal.

[8]The trial court's order did not specify the genuine issue of material fact. In a subsequent motion to clarify, counsel for the Plaintiff Class pointed out that both parties had taken the position that there was no genuine issue of material fact.

years.[9] Harris was not seeking to be placed back into the old Life of Georgia plan; rather, like Howell, he wanted his benefits calculated under the TCRS plan, but also wanted credit for his noncontributory years as he had had under the Life of Georgia plan. For both Harris and Howell, the initial actual monthly benefit received under the TCRS plan, without inclusion of the noncontributory years in the calculation, exceeded the projected monthly benefit under the Life of Georgia plan, including the noncontributory years in the Life of Georgia plan calculation.[10]

In his testimony, TCRS Director Hennessee outlined the process for the actuarial study. He explained that, if the County wanted enhanced benefits under the TCRS plan, such as cost-of-living adjustments in benefits, it had to pay TCRS $3 million more than the County had already paid into the Life of Georgia plan. He testified that the actuarial study that was the basis for the $3 million figure did not include employees' noncontributory years. Thus, the $3 million appropriated by the County to participate in the TCRS plan would not cover benefits under the TCRS plan if those benefits included employees' noncontributory years. Hennessee maintained that employees had the option of keeping credit for their noncontributory years by exercising their option to stay in the Life of Georgia plan, rather than transferring to the TCRS plan. However, they would forego the enhanced benefits provided under the TCRS plan. At the conclusion of the hearing, the trial court took the matter under advisement.

On April 26, 2007, the trial court entered an order awarding judgment to the Plaintiff Class. In the order, the trial court framed the issue and analyzed it as follows:

> The central issue thus becomes, was there an enforceable contract between Maury County and its employees? The answer is yes. The plain, clear and unambiguous language of Resolution 17 obligated Maury County to incur the costs of providing the employees . . . with <u>all</u> years of credited service, not merely those years during which the employee had made contributions. This is consistent with Resolution 31, is consistent wit [sic] the

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[9]If Harris were given credit for his initial term of employment with the County from 1968 through 1972, he would have been credited with additional service beyond the noncontributory years under the terms of the Life of Georgia plan.

[10]Howell received a monthly benefit of $2,050.45 under the TCRS plan; he was projected to receive a monthly benefit of $1528 under the Life of Georgia plan. Harris received a monthly benefit of $1,000.73 under the TCRS plan; if Harris did not receive credit for his first term of service with the County, he was projected to receive a monthly benefit of $988 under the Life of Georgia plan. Receiving credit for the first term of service would increase Harris's projected monthly benefit under the Life of Georgia plan to $1118.

assumptions stated by the actuary, is consistent with the Life of Georgia Plan and most importantly, is consistent with the law.

Thus, the trial court found that Resolution 17 constituted an enforceable contract between the County and its employees, which was breached by the County's failure to include employees' noncontributory years in the calculation of benefits under the TCRS plan. The trial court assessed costs against the County and awarded money damages to each retired class member. Counsel for the Plaintiff Class was required to calculate the money damages, and the County was required to honor the "agreement" as to each class member.[11]

After that, both parties filed post trial motions seeking clarification of the trial court's order. The Plaintiff Class also filed a motion for attorney's fees. After some delay, the trial court ultimately ordered the County to pay $3,297,000 to TCRS to fund the Plaintiff Class's noncontributory years of service and awarded attorney's fees to the Plaintiff Class under the common fund doctrine.[12] The County now appeals.

ISSUES ON APPEAL AND STANDARD OF REVIEW

The County raises the following issues on appeal:

1) Whether the trial court erred in ruling that Maury County had breached any agreement to provide benefits to the Plaintiff Class when the County adopted resolutions authorizing participation in a retirement plan that provided the Plaintiff Class with retirement benefits that exceeded the amounts the original agreement had provided; and

[11]The trial court concluded that Harris was entitled to credit for his first term of employment with the County from 1968 to 1972.

[12]The common fund doctrine is an exception to the "American Rule," which provides that the prevailing party in a civil action may not recover attorney's fees as a component of damages absent a specific statutory or contractual ground. ***House v. Estate of Edmondson***, 245 S.W.3d 372, 377 (Tenn. 2008) (citing ***John Kohl & Co. v. Dearborn & Ewing***, 977 S.W.2d 528, 534 (Tenn. 1998)). "The common fund doctrine provides that attorney's fees may be awarded when the efforts of a litigant succeeds [sic] in 'securing, augmenting, or preserving property or a fund of money in which other people are entitled to share in common.' " ***Id.*** (quoting ***Travelers Ins. Co. v. Williams***, 541 S.W.2d 587, 589 (Tenn. 1976)). In such a case, the common fund beneficiaries may be called upon "to contribute to the litigant's attorney's fees by having those fees assessed against the fund . . .." ***Id.*** at 377-78 (citing ***Kline v. Eyrich***, 69 S.W.3d 197, 204 (Tenn. 2002)). The trial court's application of the common fund doctrine is not an issue on appeal.

> 2) Whether the trial court erred in ruling that Harris had additional years of credited service beyond what the original retirement plan document provided for him or any other plan participant.

The Plaintiff Class raises the following issue on appeal:

> Whether the trial court reached the correct result, but with liability imposed and relief granted under an un-pled, but tried by consent, theory of violation of law.

Because this case was tried by the trial court sitting without a jury, we review the trial court's findings of fact *de novo*, with a presumption of correctness unless the evidence preponderates to the contrary. ***Wheeler v. Pickle***, No. W2007-02731-COA-R3-CV, 2008 WL 5263380, at *3 (Tenn. Ct. App. Dec. 17, 2008), *no perm. app.* (citing TENN. R. APP. P. 13(d); ***Campbell v. Fla. Steel Corp.***, 919 S.W.2d 26, 35 (Tenn. 1996)). The trial court's conclusions of law are reviewed *de novo* with no presumption of correctness. ***Id.*** (citing ***Campbell***, 919 S.W.2d at 35).

ANALYSIS

We consider first the threshold issue of whether Resolution 17 constituted a contract between the County and the employees. The Plaintiff Class argues that Resolution 17 clearly provides County employees with the right to include in their retirement calculation all of the years of service that would have been credited under the Life of Georgia Plan, and that the rights granted to employees under Resolution 17 are contractual and enforceable. It relies in particular on the following language in Resolution 17:

> 1. PRIOR SERVICE: The political subdivision will assume all liability (both employer and employee) for all prior years of credited service for employees who are actively participating in the current retirement plan.

The Plaintiff Class notes that the term "credited service" had been defined for many years under the Life of Georgia plan to include noncontributory years. It argues that County officials did not accurately estimate the costs of implementing the new plan, in that they did not include noncontributory years of service, and maintains that the County must fund the plan to which it obligated itself in Resolution 17.

The County argues that Tennessee caselaw establishes a presumption against reading legislation such as Resolution 17 to create a contract, citing ***Ussery v. City of Columbia***, No. M2008-01113-COA-R3-CV, 2009 WL 1546382 (Tenn. Ct. App. June 1, 2009), *perm. app.*

filed Aug. 31, 2009. The County contends that the Plaintiff Class did not rebut this presumption, that in fact the record shows that the County Commission made a conscious decision to exclude the noncontributory years under the TCRS plan in favor of other enhanced benefits, and that the overall language in Resolution 17 supports this conclusion. The County notes that Harris and Howell both chose to join the TCRS plan, even though they could have retired under the old Life of Georgia plan, and they now seek to draw the enhanced benefits under the TCRS plan *and* obtain credit for the noncontributory years as occurred under the old Life of Georgia plan.

The Plaintiff Class questions whether the presumption in ***Ussery*** applies in this case, because the subject matter of the legislation – Resolution 17 – involved vested fixed rights. Even if the presumption does apply, the Plaintiff Class maintains that it is rebutted by the language in Resolution 17 and the overall circumstances.

Presumption

We consider first whether there is a presumption that legislation does not grant contractual rights and, if so, whether the presumption applies in the instant case, starting with analysis of the ***Ussery*** decision.

In ***Ussery***, the plaintiff class of police officers alleged that the defendant employer city breached a contract by failing to provide step pay raises in accordance with employee handbooks and certain ordinances. The trial court held in part that the ordinances gave rise to an implied contract and granted judgment in favor of the police officers. The city appealed. ***Id.*** at *1.

On appeal, this Court noted that the police officers relied on a contract theory and stated that police officers bore the burden of "overcom[ing] the presumption that ordinances and statutes are not contractual in nature." ***Id.*** at *9. To determine whether legislation creates contractual rights, the ***Ussery*** court quoted the following standard set forth by the United States Supreme Court in ***Dodge v. Bd. of Educ. of Chicago***:

> The parties agree that a state may enter into contracts with citizens, the obligation of which the Legislature cannot impair by subsequent enactment. They agree that legislation which merely declares a state policy, and directs a subordinate body to carry it into effect, is subject to revision or repeal in the discretion of the Legislature. . . .
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> In determining whether a law tenders a contract to a citizen, it is of first importance to examine the language of the statute. If it provides for the execution of a written contract on behalf of the state, the case for an obligation

> binding upon the state is clear. Equally clear is the case where a statute confirms a settlement of disputed rights and defines its terms. On the other hand, an act merely fixing salaries of officers creates no contract in their favor, and the compensation named may be altered at the will of the Legislature. This is true also of an act fixing the term or tenure of a public officer or an employee of a state agency. The presumption is that such a law is not intended to create private contractual or vested rights, but merely declares a policy to be pursued until the Legislature shall ordain otherwise. He who asserts the creation of a contract with the state in such a case has the burden of overcoming the presumption. If, upon a construction of the statute, it is found that the payments are gratuities, involving no agreement of the parties, the grant of them creates no vested right.

Id. at *10 (quoting ***Dodge v. Bd. of Educ. of Chicago***, 302 U.S. 74, 78-79 (1937). Thus, under ***Dodge***, the Court must first examine the language in the legislation, to determine whether it appears intended to establish a contract or settle disputed rights, or whether it instead declares a legislative policy. ***Dodge*** states that the party who asserts that the legislation creates a contract has the burden of overcoming the presumption against such an interpretation. The ***Ussery*** court noted that the trial court in that case had stopped short of concluding that the ordinances at issue gave rise to an express contract, but, rather, found that the ordinances gave rise to an implied contract in law. It determined that the evidence did not support the finding of an implied contract. ***Id.*** at *10-11. The ***Ussery*** court went on to consider whether the ordinances at issue were a contract and were violated. ***Id.*** at *12. It found that the ordinances set forth a procedure for employees to obtain pay increases, and thus entitled the employees to step raises based on performance. It then concluded that the city violated the ordinances by failing to pay raises to the police officers. ***Id.*** at *14-15.

In light of ***Ussery*** and ***Dodge***, we conclude that there is a presumption that Resolution 17 is not intended to grant contractual rights to the Plaintiff Class. Of course, to recover for a breach of contract, a plaintiff must first show the existence of a contract. ***See***, ***e.g.***, ***ARC LifeMed, Inc. v. AMC-Tennessee, Inc.***, 183 S.W.3d 1, 26 (Tenn. Ct. App. 2005) (citing ***Custom Built Homes v. G.S. Hinsen Co., Inc.***, No. 01A01-9511-CV-00513, 1998 WL 960287 (Tenn. Ct. App. Feb. 6, 1998)). We look, then, at Resolution 17 in light of the presumption.

Resolution 17

The Plaintiff Class contends that the language of Resolution 17 is clear and unambiguous, and clearly creates a contract with the employees. Thus, the Plaintiff Class contends, this Court should "say sic lex scripta, and obey it." ***Gleaves v. Checker Cab***

Transit Corp., 15 S.W.3d 799, 803 (Tenn. 2000) (quoting ***Hawks v. City of Westmoreland***, 960 S.W.2d 10, 16 (Tenn. 1997)). It points to the portion of Resolution 17 that states:

> 1. PRIOR SERVICE: The political subdivision will assume all liability (both employer and employee) for all prior years of credited service for employees who are actively participating in the current retirement plan.

The Plaintiff Class maintains that this language clearly sounds in contract. It also argues that and the subject matter of Resolution 17 involved vested rights, as opposed to "mere gratuities," and asserts that Resolution 17 must be viewed in the context of the employer-employee relationship. Additionally, the Plaintiff Class contends that the provisions of the 1974 contract between the County and the Life of Georgia, coupled with the adoption of Resolution 17, creates contractual rights.

In response, the County points out that the issue before the Court is whether Resolution 17 was intended to be a contract, and maintains that it was not. Looking at the entirety of Resolution 17 and the information before the County Commission, the County knowingly funded only contributory years for employees participating in the TCRS. The County admits that the Plaintiff Class had vested rights in the benefits under the Life of Georgia plan, but notes that it could have terminated participation in any plan whatsoever and simply allowed employees to receive only the benefits that had vested when the Life of Georgia plan ended. By adopting Resolution 17, the County exceeded its obligation by appropriating $3,098,306 in excess of the employees' vested benefits under the Life of Georgia plan to provide the enhanced benefits under the TCRS plan.

Pursuant to ***Ussery*** and ***Dodge***, we look first at the language and purpose of Resolution 17 to determine if it was intended by the County Commission to create contractual rights. ***Ussery***, 2009 WL 1546382, at *10 (quoting ***Dodge***, 302 U.S. at 78-79). On this point, the Plaintiff Class argues that we should look first to Resolution 31 as amended, which authorized an actuarial study of the cost for the County to participate in the TCRS plan. Resolution 31 as amended may indicate an intent to fund an actuarial study including all years of service, both contributory and noncontributory. However, it is undisputed that, for whatever reason, the actuarial study actually conducted in this case did *not* include the noncontributory years. The transcript of the County Commission hearing on Resolution 17 shows clearly that the Commissioners were aware of this fact. As such, Resolution 31 does not assist us in ascertaining the intent of the County Commission in enacting Resolution 17.

Reviewing Resolution 17 as a whole, it is clear that it is not, as the Plaintiff Class seems to suggest, intended to amend or modify the Life of Georgia plan. Rather, Resolution

17 provides for replacing the Life of Georgia plan with the new TCRS plan. For this reason, the Plaintiff Class's reliance on ***Blackwell v. Quarterly County Court***, 622 S.W.2d 535 (Tenn. 1981),[13] and the terms of the 1974 contract between the County and Life of Georgia, is misplaced. The parties agree that employees who participated in the Life of Georgia plan had a vested right to the benefits they had earned under that plan. These employees, of course, retained those rights under Resolution 17. They had the right to refrain from transferring to the new TCRS plan. However, the proof showed that the Plaintiff Class had no desire to remain in the Life of Georgia plan. The reason for this was obvious; the overall benefits under the TCRS plan were substantially enhanced. Here, however, the Plaintiff Class seeks to somehow combine the two plans, taking only the most advantageous parts of both.

The clear purpose of Resolution 17 is to authorize participation in the TCRS plan and appropriate the monies to be transferred to TCRS. The sum appropriated is the exact amount contained in the actuarial study, and the record shows that the Commissioners knew that this figure did not include the employees' noncontributory years. The language in Resolution 17 does not reflect an intent "to create private contractual or vested rights," but rather, "declares a policy to be pursued until [the County Commission] shall ordain otherwise." ***Dodge***, 302 U.S. at 79. It did not provide for a written contract with employees, it did not settle disputed rights with employees, and did not reflect an agreement between the County and its employees. ***Id.*** at 78-79.

The Plaintiff Class relies on isolated language in Resolution 17 stating that the County "will assume all liability (both employer and employee) for all prior years of credited service . . .." In light of the heavy presumption in ***Dodge***, we cannot find that Resolution 17 as a whole reflects an intent by the County Commission to enter into a contract with employees to establish a new plan that includes noncontributory years under the rubric of "credited service." The language relied on by the Plaintiff Class is merely prefatory, not operative, and is at most ambiguous. The County, of course, retained liability for benefits under the Life of Georgia Plan for employees who chose not to transfer to the TCRS plan, and the benefits under the Life of Georgia plan were calculated based on credited service that included noncontributory years. Viewing Resolution 17 as a whole, with emphasis, of course, on the

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[13] ***Blackwell*** addressed the extent to which a local legislative body could *modify* the terms of a retirement plan and is inapplicable to the instant case. ***Blackwell v. Quarterly County Court***, 622 S.W.2d 535, 541 (Tenn. 1981) ("While we agree with the implicit holding of the courts below that a public employer may from time to time offer additional benefits which employees may accept expressly or by acquiescence, nevertheless we are not convinced that a plan is "frozen" against detrimental changes or modifications the moment an employee begins to participate in it, where such changes are necessary to preserve the fiscal and actuarial integrity of the plan as a whole.").

operative provisions, it reflects an intent only to authorize participation in the TCRS plan and appropriate the necessary monies to effectuate such participation. This does not amount to a contract between the County and its employees to include noncontributory years in the TCRS plan.

Violation of Resolution 17

In the alternative, the Plaintiff Class argues that the trial court should be affirmed because the County purportedly violated Resolution 17 by failing to allocate funds for the employees' noncontributory years. The Plaintiff Class concedes that this "violation of law" theory was not pled in its complaint, but asserts that it was tried by consent pursuant to Rule 15.02 of the Tennessee Rules of Civil Procedure. The Plaintiff Class relies on the following excerpt from its opening statement at trial:

> In October of '99, it comes on for an actual consideration by the County Commission, and the Resolution, the actual Resolution whereby the County modified the '74 Life of Georgia Plan is Exhibit 4 to the Stipulation. . . .
>
> . . . .
>
> We believe the 1974 Life of Georgia Plan constituted the contract with the employees, the law supports that. There was a modification made, not for any reason of actuarial unsoundness, but just simply because Life of Georgia had requested to be discontinued being the administrator. And so the County set about this, and they set about to do it exactly as they should have done it.
>
> The language is plain, clear, and simple, I submit, but the proof will show that when the information was gathered up and was sent in, it was incomplete and inconsistent, and these employees, these class members, lost years of service by reason of that.

We find that this language simply does not support the Plaintiff Class's assertion that this theory was tried before the trial court.

We decline to consider on appeal an issue or theory not submitted to the trial court below. ***See Simpson v. Frontier Cmty. Credit Union***, 810 S.W.2d 147, 153 (Tenn. 1991) (citing ***Lovell v. Metro. Gov't***, 696 S.W.2d 2 (Tenn.1985); ***Lawrence v. Stanford***, 655 S.W.2d 927 (Tenn.1983)).

This holding pretermits all other issues on appeal.

CONCLUSION

The judgment of the trial court is reversed. The costs of this appeal are taxed to the Appellees, Wendell Harris and A.C. Howell, for which execution may issue if necessary.

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HOLLY M. KIRBY, JUDGE